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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 22

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,
Petitioner,

vs.

FIRST NATIONAL BANK IN INDIANA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT FIRST NATIONAL BANK IN INDIANA, PA.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT FIRST NATIONAL BANK IN INDIANA, PA.

Counter Statement of Questions Presented

1. Can a member bank of the Federal Reserve System be held liable for conversion of Home Owners Loan Corporation bonds payable to bearer and guaranteed by the United States Government by sending them to the Federal Reserve Bank for redemption or collection in the condition received and by paying the proceeds collected to its customer less registration and transportation expenses when there is no evidence of notice of defect or infirmity in the bonds?

(Argued under heading II, Page 14.)

2. Is Federal law applicable to determine the duties, rights and liabilities of parties in transactions involving Home Owners Loan Corporation bonds, payable to bearer, guaranteed by United States Government, and issued under Act of Congress authorizing Treasury regulations concerning the redemption or collection thereof by member banks of the Federal Reserve System?

(Argued under headings III and IV, Pages 19 and 27.)

3. Did the trial court err in permitting Exhibits 7, 8, 9 and 10 to be read in evidence to the jury as notice to First National Bank in Indiana without proof of knowledge of their contents having reached said defendant bank?

(Argued under heading V, Page 32.)

Statutes Involved

Conformity Act of September 24, 1789 U. S. Statutes at Large Volume 1, page 92, as amended, Title 28 U. S. C. A. Section 1652.

Statutory provisions known as the "Home Owners Loan Act of 1933" Title 12 U. S. C. A. Section 1461 *et seq.*, as amended and approved by the Act of April 27, 1934, and Treasury Regulations issued thereunder.

The Conformity Act and pertinent excerpts from Treasury Regulations are printed in the Appendix at end of this Brief.

Statement of the Case

In order to avoid confusing the facts which relate only to the First National Bank in Indiana, Pa. with those which relate to the other defendants, and for the sake of

accuracy, we deem it necessary to make the following statement of the case somewhat in detail.

This is a civil action brought by Bank of America National Trust and Savings Association, of San Francisco, California, against four defendants as follows:

Arthur A. Rocco, of Homer City, Pennsylvania;
Gilbert S. Parnell, of Indiana, Pennsylvania;
First National Bank of Indiana, Pennsylvania; and
Federal Reserve Bank of Cleveland, Ohio, with a branch office in the City of Pittsburgh, Pennsylvania (12a).

The Complaint charges *each* of said defendants *separately* with having *converted*, on September 28, 1948 and October 25, 1948 respectively, the two lots of Home Owners' Loan Corporation bonds as described in the Complaint as the property of plaintiff (13a, 14a), of the value of $57,600.00. *The Complaint contains no allegation of conspiracy*, nor is there any evidence or indication thereof.

The case was dismissed against the Federal Reserve Bank of Cleveland on motion based on Federal Law and Treasury Regulations at the conclusion of plaintiff's case in chief (285a, 300a and 413a). At the same time at the conclusion of plaintiff's case in chief a motion in behalf of First National Bank in Indiana for dismissal was made and refused (262a, 300a) and renewed at the conclusion of the case (413a). The jury rendered three *separate verdicts* against each of the three defendants for the full principal amount of plaintiff's claim, namely $57,600.00 each, allowing no interest (439a).

The bonds in question were all issued under *Act of Congress approved April 27, 1934, were at all relevant times negotiable, payable to bearer, guaranteed by the United States Government* and subject to call on or after May 1,

1944 (see Exhibit 1-A, specimen copy of bonds 449a and plaintiff's Answer to Defendant Bank's Request for Admissions, 28a). The bonds had been called for redemption on or about May 1 or 2, 1944 (64a).

All of the bonds in this case with other securities disappeared from plaintiff's banking place of business, San Francisco, California on May 2, 1944 (the story of this disappearance appears in testimony of Miss Britton, 59a to 71a).

The first lot of bonds described in the Complaint in the condition received (13a) were placed in the hands of defendant bank on September 28, 1948 for redemption or collection by Gilbert S. Parnell, an attorney, a depositor of the bank and also a director, without defendant bank having any notice of defect or infirmity. (See Plaintiff's Answer to Defendant Bank's Request for Admissions (b), 28a and testimony of cashier of defendant bank 339a to 341a, inclusive). This lot of bonds was sent, on September 28, 1948 by letter signed by T. Edgar Walker, Assistant Cashier of defendant bank, to the Pittsburgh Branch of Federal Reserve Bank of Cleveland for redemption (letter Exhibit 1, 20a). Pittsburgh Branch of Federal Reserve Bank credited the proceeds of redemption on September 30, 1948 of this first lot of bonds to First National Bank in Indiana, Pa. in the sum of $19,600.00 (Ex. 2, 21a). First National Bank in Indiana, on October 1, 1948 paid by cashier's check signed by T. Edgar Walker, Assistant Cashier, to the order of Gilbert S. Parnell, attorney at law, the sum of $19,590.00, $10.00 having been deducted as the bank's expenses (see Ex. 3, 22a, also record 332a to 334a inclusive).

The second lot of bonds as described in the Complaint in the condition received (14a) were likewise placed in the hands of defendant bank on October 25, 1948 by Gilbert S.

Parnell, an attorney, a depositor and also a director of defendant bank, without notice of defect or infirmity, for redemption or collection (30a and 341a to 342a, inclusive). This second lot of bonds were sent, on October 25, 1948 by letter signed by T. Edgar Walker, Assistant Cashier, to the Pittsburgh Branch of the Federal Reserve Bank of Cleveland for redemption (see Ex. 22a). The Pittsburgh Branch of Federal Reserve Bank credited the proceeds of the redemption on October 26, 1948 of this second lot of bonds to the First National Bank in Indiana in the sum of $38,000.00 (Ex. 5, 23a). The First National Bank in Indiana, on October 28, 1948 paid by cashier's check signed by T. Edgar Walker, Assistant Cashier of defendant bank to the order of Gilbert S. Parnell, attorney, $37,980.00, being the sum credited less $20.00 as costs and expenses (see Ex. 6, 24a, also record 335a to and inclusive of 336a).

The defendant, First National Bank in Indiana, has its place of business in a small town of approximately 10,000 population (338a) in which no brokerage house is located (362a).

In the trial of this case Plaintiff's Exhibits 7 to 10 inclusive were read as evidence "against all defendants" over defendant's objections in behalf of defendant bank as appears in the record 93a-148a. There was no evidence that the contents of any of these exhibits ever reached defendant bank.

Exhibit 7—Letter from Federal Reserve Bank of San Francisco to *Federal Reserve Bank of Cleveland dated May 5, 1944* (93a, read in record page 98a).

Exhibit 8—Letter from Bank of America to *Federal Reserve Bank of Cleveland dated May 9, 1944* (99a, read in the record pages 100a, 101a, 102a).

Exhibit 9—Letter from Treasury Department of United States to Mr. Fleming, *Federal Reserve Bank of Cleveland* dated May 15, 1944 (104a, read into the record pages 108a to 111a inclusive, to which letter was attached two other letters).

Exhibit 10—Mimeograph form notice (photostatic copy) from files of Federal Reserve Bank (114a). Introduction of this exhibit was continuously objected to by defendant. (Limited stipulation 249a and 250a did not bear on this objection.)

Notwithstanding objection, Exhibit 10 was introduced, read and shown to jury (251a).

Plaintiff offered in evidence Paragraph 7 of defendant bank's Answer, together with all sub-paragraphs (b) to (e) inclusive (158a to 164a) and Paragraph 11, including sub-paragraphs (g) to (j) inclusive (165a to 168a) and defendant bank's exhibits attached to the Answer numbered 1 to 6 inclusive. This record of defendant's Answer shows that on September 28th and October 25th of 1948 respectively the two lots of bonds were delivered by Gilbert S. Parnell to defendant bank for redemption; that said lots of bonds were redeemed by defendant bank through the Pittsburgh Branch of Federal Reserve Bank of Cleveland, and that on October 1, 1948 defendant bank paid by cashier's check to Gilbert S. Parnell, attorney, $19,600 less $10.00 expenses, being the proceeds of the first lot of bonds, and on October 28, 1948 paid to said Gilbert S. Parnell, attorney, by cashier's check the sum of $38,000 less $20.00 expenses.

Defendant, First National Bank in Indiana, offered in evidence the Answer of plaintiff to defendant's Request

for Admissions by Plaintiff (322a to 336a inclusive) which shows the identical facts as offered by plaintiff (157a, 171a). These Answers by plaintiff to defendant's Request show that the two lots of bonds payable to bearer were redeemed by defendant bank in the regular course of business and the proceeds, less expenses, were paid by cashier's check to Gilbert S. Parnell, attorney, who had left the bonds with defendant bank for redemption (25a to 30a inclusive).

The case was submitted *to the jury as if separate actions had been brought against each of the different defendants* (429a). The jury returned three separate verdicts for the full principal amount of plaintiff's claim, without interest, on October 15, 1954 (439a), and on said date, October 15, 1954, separate judgments were entered against Arthur A. Rocco for $57,600, against Gilbert S. Parnell for $57,600, and against the First National Bank in Indiana for $57,600 (9a).

On October 22, 1954, in behalf of First National Bank in Indiana a motion was filed to set aside the judgment entered on the verdict under Rule 50 (b) of Federal Rules of Civil Procedure and for a new trial (440a). On November 16, 1954 defendant bank's motion to set aside the judgment and for a new trial were refused by the Court (447a). From this judgment against First National Bank in Indiana an appeal was taken to the United States Court of Appeals.

This appeal to the United States Court of Appeals was argued April 19, 1955 before three judges, namely Goodrich, McLaughlin and Staley, J. J. The Court, *of its own volition*, ordered a reargument, which took place June 6, 1955 before the Court *en banc*, consisting of Biggs, P. J., Maris, Goodrich, McLaughlin, Kalodner, Staley and Hastie,

J. J. The majority decision October 12, 1955 by Biggs, P. J., Maris, Staley and Hastie reversed the decision of the District Court and directed judgment to be entered in favor of defendant First National Bank in Indiana.

Summary of Argument

I.

Regardless of the specific substantive law which controls the outcome of the case, the subject matter of this case concerns Home Owners' Loan Corporation bonds, issued under Act of Congress authorizing Treasury Regulations, and payable to bearer.

The bonds were unconditionally guaranteed by the United States Government, both as to principal and interest. Under the Act of Congress, the United States Treasury Department had authority to issue and did issue Treasury Regulations which provided for presentation, surrender and payment thereof. This Treasury Regulation provided that, upon appropriate request, a Federal Reserve Bank may make payment to a member bank by crediting the amount to the member bank's account. Defendant bank was and still is a member bank of Federal Reserve System.

II.

The bonds in question were placed in the hands of defendant bank for redemption or collection and were sent in the condition received by registered letter signed by the Assistant Cashier, to the Pittsburgh Branch of Federal Reserve Bank of Cleveland, and the proceeds deposited to the credit of First National Bank in Indiana, the defendant, and on the same day received, paid to its customer

less $10.00 as registration and insurance expense on one lot of bonds and $20.00 on the other one. These facts are shown by Exhibits 1 to 6 inclusive, pages 20a to 24a of the Record.

It is our position defendant bank never owned or had title to the bonds in question. It was merely the transfer agent or conduit (Grantal vs. National Surety, 254 N. Y. 483, 173 N. E. 682, First National Bank of Blairstown vs. Goldberg, 340 Pa. 337 at page 343) in sending the bonds for redemption or collection. It never paid any consideration for them and it only realized $10.00 as an expense for its services in one instance and $20.00 in the other. The bonds having been sent for collection or redemption in the condition received, the fact that they had inoperative coupons attached, so far as this defendant is concerned was entirely immaterial. Plaintiff petitioner failed to prove as against defendant bank, notice or knowledge of defect or infirmity in the bonds. The Negotiable Instruments Law has no application whatever to the uncontroverted facts in this case and the attempt to apply it does nothing except to create confusion. Under the facts in this case defendant bank cannot legally be held to be a converter of the bonds, and this is true both under Federal Law or the laws of the Commonwealth of Pennsylvania.

The following are federal cases in support of the foregoing position:

Clearfield Trust Co. v. U. S., 318 U. S. 63 (1943).
National Metropolitan Bank v. U. S., 323 U. S. 454 (1945).
U. S. v. Birdsall, 233 U. S. 223 (1914).
U. S. v. Janowitz, 257 U. S. 42 (1921).
Murray v. Lardner, 69 U. S. 110 (1864).
Hotchkiss v. National Bank, 88 U. S. 354 (1874).
Morgan v. U. S., 113 U. S. 476 (1865).

III.

Federal Law and Treasury Regulations are applicable to the instant case. They determine the fact that the bonds are bearer bonds, irrespective of the fact of their having been called prior to their due date and had inoperative coupons attached, and that their method of payment is provided for by Treasury Regulations issued by the authority of the Act of Congress under which the bonds were issued. Federal Law and Treasury Regulations are particularly applicable to the instant case since the redemption or collection by defendant bank was in strict compliance with the Treasury Regulation in that defendant bank sent by registered letter, the bonds to Federal Reserve Bank requesting payment, and as provided by said Treasury Regulation, the Federal Reserve Bank made payment by depositing the proceeds to the credit of defendant bank, a member bank of the Federal Reserve System.

IV.

It has been our position throughout in this case that the burden of proof of bad faith concerning United States bearer bonds rests on him who asserts it. This position has been upheld in this case by the majority ruling of United States Court of Appeals. This burden of proof rule has been upheld not only by our Federal courts, but also by Pennsylvania courts (First National Bank of Blairstown vs. Goldberg, *et al.*, 340 Pa. 337, particularly at page 343) and was followed by the Court of Appeals of New York State in the case of Gruntal, *et al.* vs. National Surety Corp., 254 N. Y. 483 (173 N. E. 682, 73 A. L. R. 1337).

The record in this case fails to show proof of notice of defect or infirmity of the bonds so far as defendant bank

was concerned. Plaintiff undertook to prove notice by introducing certain exhibits (7, 8, 9 and 10) but Goodrich, J. in his dissenting opinion (515) concedes, "It is not claimed that any of these (Exhibits 7, 8, 9 and 10) reached the Indiana Bank so as to charge it with knowledge these notices contained."

It is our contention that State Negotiable Instrument Law has no application to the uncontroverted facts in the instant case.

The securities in question have their origin in the Act of Congress which authorizes Treasury Regulations concerning, among other things, the method of payment by request on the Federal Reserve Bank from a member bank of its system. Defendant bank, as a member bank of the Federal System, requested redemption or payment as provided by Treasury Regulation in strict accordance therewith. The proceeds were deposited to the credit of defendant bank and paid by its Assistant Cashier's check to its customer, less a small expense of $10.00 in one instance and $20.00 in the other.

To undertake to place defendant bank in the position of a "holder" or "purchaser" of these bonds and apply the local Negotiable Instruments Law as if defendant bank was such holder or purchaser, is entirely without merit.

V.

The petitioner, plaintiff, undertook to prove notice to defendant bank of defect or infirmity in the bonds by use of Exhibits 7, 8, 9 and 10, which are referred to in our Statement of the Case. They were offered in evidence and read to the jury against all of the defendants, on the assumption that proof of their contents would be "brought home to defendants". When plaintiff failed to prove that

knowledge of these exhibits had reached defendant bank, a motion was made to strike them from the record with instructions to the jury to disregard them. This, however, was refused by the Court.

The question of the admission of these exhibits was raised in the United States Court of Appeals, but that Court held so far as defendant bank was concerned, it was unnecessary to consider the question of their admission. Should this Honorable Court conclude as did the Third Circuit Court of Appeals, it will find it unnecessary to consider these exhibits. However, it is our contention their admission was clear error and they should have been stricken from the record with proper instructions to the jury.

ARGUMENT

I

Facts concerning subject matter, Acts of Congress and Treasury Regulations.

The subject matter of this case is Home Owners Loan Corporation bonds payable to bearer. They were issued under the Act of Congress which is known as the "Home Owners Loan Act of 1933" Title 12 U. S. C. A. Sec. 1461 *et seq.* as amended and approved by the Act of April 27, 1934. They had been called but were not yet due. The bonds include the following provisions:

> "The Corporation will pay principal and interest when due, at the Treasury Department, Washington, D. C. or at any government agency in the United States which the Secretary of the Treasury may from time to time designate for the purpose."

All of the bonds were fully and unconditionally guaranteed by the United States of America (Ex.1-A, specimen

form of bond, 449a). The Act of Congress which authorized the issuance of the H. O. L. C. bonds in question contains the following language:

> "Such bonds shall be in such forms and denominations, shall mature within such periods of not more than eighteen years from the date of their issue, shall bear such rates of interest not exceeding 4 per centum per annum, shall be subject to such terms and conditions, and shall be issued in such manner and sold at such prices as may be prescribed by the Corporation, with the approval of the Secretary of the Treasury. Such bonds shall be fully and unconditionally guaranteed both as to interest and principal by the United States * * *." 12 U. S. C. A. Sec. 1463 (c).

This Act has not been repealed or modified. Section 8 of Public Law No. 178, 73rd Congress, approved April 27, 1934, authorized Federal Reserve Banks to act as fiscal agents of the H. O. L. C., in the following language:

> "The Federal Reserve banks are authorized, with the approval of the Secretary of the Treasury, to act as depositaries, custodians, and fiscal agents for the Home Owners' Loan Corporation." 12 U. S. C. A. Sec. 394. Act of Apr. 27, 1934, 48 Stat. 646.

Under the foregoing Acts of Congress a Treasury Regulation, being Treasury Department Circular No. 666, 6 Fed. Register 3726, 31 Code of Fed. Regulations Sec. 307.5 @ p. 396 was issued in 1941 which provides in regard to presentation, surrender and payment of United States bearer securities, among other things as follows:

> "Coupon bonds, notes, certificates of indebtedness, Treasury bills, and other bearer securities which have become due and payable, whether at maturity or by virtue of a call for redemption before maturity, are payable in due course *to the person presenting and surrendering them for redemption, or to such person as he may designate.*
>
> * * *

> A Federal Reserve Bank, upon appropriate request, may make payment to a member bank from which bearer securities are received *by crediting the amount in the member bank's account.*" (Emphasis supplied.)

Defendant First National Bank in Indiana was and still is a member bank of Federal Reserve System (289a).

II

Under the admitted, uncontroverted facts in this case, defendant bank is not liable for conversion.

Plaintiff, throughout in the trial of this case, has *erroneously* insisted on placing defendant bank in the legal position of a "holder" or "purchaser" of the bonds in question, and in failing to apply the facts applicable to the defendant bank separately and independently of the other defendants.

It is important in this, as in every case, to have a clear knowledge and understanding of the facts. *What now are the facts applicable to defendant bank?* In order to get them accurately before the Court we respectfully request this Honorable Court to read Exhibits 1 to 6 inclusive, as they appear in the record pages 20a to 24a. These exhibits were read into the record by plaintiff as admissions taken from defendant bank's Answer (158a to 171a). They were read into the record as admissions by defendant based on plaintiff's Answer to Defendant's Requests for Admissions (see Defendant's Request for Admissions, 25a, Plaintiff's Answer to Requests, 28a, and as read in the record for defendant bank, 322a to 336a). A plain[redacted] statement of the facts based on these exhibits is that these bonds were placed in the hands of defendant bank for redemption or collection, not as a "holder" or "purchaser". Defendant bank never owned or had title to the bonds. *No consideration whatever was paid for them by defendant bank.*

They were sent by mail *in the condition received by it* to the Pittsburgh Branch of the Federal Reserve Bank of Cleveland for redemption or collection. It will be noted that T. Edgar Walker, Assistant Cashier of defendant bank who issued the checks in payment and the transmittal letters (20a, 22a, 24a Record), died before the time of trial and could not be called as a witness (341a Record). The proceeds of their redemption or collection was placed to the credit of the First National Bank in Indiana by the Federal Reserve Bank (21a, 23a Record) and paid out by defendant bank's cashier's check less an expense item for registration and insurance, $10.00 for one lot of the bonds and $20.00 for the other lot. Contrary to statement and inferences given in Petitioner-Appellant's statement of facts, the evidence of the defendant First National Bank in Indiana was clear and unequivocal and in no way conflicting. The evidence supports the facts as here stated. It must always be borne in mind that the case of the First National Bank in Indiana must be considered upon its own facts and not merged in statements of conclusion as to all defendants as is done by petitioner. Defendant bank never was a holder or purchaser in due course as claimed by plaintiff. It was nothing more than a collecting agent or representative. These uncontradicted facts show defendant bank never even claimed to be a "holder" or "purchaser" of the bonds in due course. Therefore no liability as a holder in due course or purchaser could attach to defendant bank since it never was such holder or purchaser, and there could be no conversion. Black's Law Dictionary, page 430, defines "conversion" as follows:

> "Conversion is an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights."

Restatement of American Law Institute on Agency, Section 349 (g) states:

> "Thus, if an agent sells, on account of his principal, a negotiable instrument, the holder of which has the power to pass title, the agent does not commit conversion if he sells such instrument without notice of the rights of the person entitled to possession, although his principal is not a *bona fide* holder of the instrument."

The defendant bank's position in this case is no different than it would be in any case where bonds of any kind, coupons or other items were left with it for collection. If the majority opinion of the Court in this case is not upheld, no bank would ever be safe in accepting from its customers any securities of any kind whatever *for collection* because of the added responsibility of unavailable trial proof placed upon them if questioned, despite absolute good faith. There would thus then be a serious impediment placed upon the process of redemption of United States Government Securities, and in the interest of public policy in this regard, the decision of the majority should prevail.

* *Overdue bonds have to be collected.* How can they be collected if there is a rule of law which raises a red flag of warning that they may have been stolen? (footnote 1)

It is a fact here to be noted that plaintiff undertook to prove notice of defect or infirmity by use of Exhibits 7, 8, 9 and 10 referred to in our statement of the case, which exhibits we will later discuss in our argument. But even the dissenting opinion written by Goodrich, J. regarding these

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(Footnote 1) Report of the Secretary of the Treasury for the year 1947 @ p. 334 shows: Summary of Public Debt and Guaranteed Obligations Outstanding June 30, 1947—Matured debt on which interest has ceased $230,913,535.76; and guaranteed obligations—Matured debt on which interest has ceased $6,307,900.00 @ p 349, classification of the above debt includes "Old debt matured—issued prior to Apr. 1, 1917, Postal Savings bonds, Liberty bonds, Victory notes, Treasury bonds, H. O. L. C. bonds, etc."

exhibits concedes "It is not claimed that any of these reached the Indiana Bank so as to charge it with knowledge which these notices contained" (515).

Based on the foregoing facts we respectfully submit this case is entirely outside the section of Negotiable Instrument Law cited by appellants for two reasons: first, the bonds were issued under Act of Congress, guaranteed by the United States Government and therefore fall under the exception to the Conformity Act and are controlled by Federal Law (discussed fully in following Subhead III); and second, the facts show defendant bank had no other interest in the bonds except to forward them on for redemption or collection and never was or claimed to be a holder for value, or purchaser, under either Pennsylvania or Federal Law.

We further state the fact that the bonds had been called, had inoperative coupons attached, were past due or not due until the date of their maturity, was wholly immaterial as far as defendant bank is concerned. It sent the bonds *in the condition received* to the proper place for redemption or collection and as collection items, payment was made to its customer. Under these admitted uncontroverted facts defendant bank could not legally be held to be a converter. There is no need to confuse the issue in this case by charging defendant bank as a holder or purchaser of these bonds as negotiable instruments when the facts, admitted and offered by both plaintiff and defendant bank, show otherwise. The following authorities all support the above stated position:

Gruntal *et al.* v. National Surety Corp., 254 N. Y. 483 (173 N. E. 682, 73 ALR 1337).

Morgan v. United States, 113 U. S. 476.

Hotchkiss vs. National Bank, 88 U. S. 354.

Listie Coal Co. v. Farmers National Bank, 287 Pa. 337.

First National Bank of Blairstown v. Goldberg *et al.*, 340 Pa. 337 and particularly at page 343.

The dissenting opinion completely misapprehends the actual facts in this case. In the dissenting opinion, page 510, is stated the following:

> "It (defendant bank) was a "holder" of the paper because it was in possession of an instrument payable to bearer."

(Cited in footnote is Pa. Negotiable Instruments Law as authority.) This statement entirely disregards the facts, and the authority given a member bank of the Federal Reserve System under the U. S. Treasury Regulation heretofore referred to to present bonds as in the instant case for collection. Defendant bank under the facts in this case and U. S. Treasury Regulation never was in any conceivable sense a legal "holder" of the bonds in question. To hold it was such legal holder would place every member bank of the Federal Reserve System in a position never to be able to accept any U. S. Government securities payable to bearer for collection with safety. Further, the mysterious circumstances under which the bonds dissappeared from inside the Plaintiff Bank (61a *et seq.*), combined with the good faith of the Defendant Bank bring into play the familiar maxim that as between two innocent parties, the one who brings about a loss should bear it. See Sherwood Distilling Co. vs. People's First National Bank & Trust Co., 193 Fed. 2nd 649; and Gimbel Bros vs. Hymowitz, 160 Pa. S. C. 327, 330.

III

Applicable Federal Law and Treasury Regulations.

We submit it is beyond question that these are *bearer bonds,* for the bonds themselves so state (Plaintiff's Ex. 1-A, 449a). The fact that the bonds had been called did not change their legal status in this respect. The case of *Morgan vs. United States,* 113 U. S. 476 (1865), is an important authority on this point. We quote the following excerpts from the opinion of this case applicable to the instant case:

P. 498

> "The legal effect of the call undoubtedly is to entitle the holder to demand payment at its maturity, and, even though not demanded, to exonerate the government from liability for interest accruing after that date; but, consistently with the terms of the statutes and the obvious purposes in view in the original creation and issue of the securities in the form adopted, it cannot be, that the legal effect of such a call for the purpose of redemption is the same as if the bond had been originally framed as an obligation to pay absolutely on a day previously fixed."

* * *

P. 499

> "*and in that form, it seems to us quite plain that it could not be considered an overdue obligation, in the sense in which that term is applied to ordinary commercial paper, until after the limit fixed for final payment had been passed.*" (Emphasis ours)

* * *

P. 500

> "for, as we have already shown, the only change in the original effect of the contract by the exercise of the right of earlier redemption is to stop the obligation to pay future interest. And as against one choosing for any purpose of his own to retain his bond as a

> continuing security for the value it always represents, having impressed upon it by the law of its creation the faculty of passing from hand to hand as money, and therefore just as useful in the pursuits of trade and the exchanges of commerce and banking as so much money in the form of coin or bank notes, and more convenient because more portable, no such presumption can be entertained on the ground that its continued circulation is not in the due course of business, that it has fully performed all its intended functions, and that it has been in any sense dishonored by a refusal on the part of the obligor to fulfill its obligations."

This statement of law as made by the United States Supreme Court, as we have quoted herein, is still the law, and therefore the fact that the bonds in question had been called did not change their legal effect or status as bearer bonds.

Our Pennsylvania State Supreme Court has held to this rule, citing this Morgan case and other authorities. We refer to *Listie Coal Co. vs. Farmer's National Bank*, 287 Pa. 337 (1926), which states that past due coupons for four and a half years attached to bonds were not notice (at page 342). The time element, whether it be months or years, can be of no import, particularly in the case of a broker or bank transmitting for collection or redemption. Even the *ex post facto* Uniform Commercial Code (enacted in Pennsylvania in 1953 and in no other state) at Section 8-305 to which petitioner, plaintiff refers, is limited to a "purchase" and judiciously does not apply to transfer agents. Treasury Department Regulations direct that such coupons be left attached to the securities: *Treasury Dept. Regulations Circular #666*, 6 Fed. Register 3726, 31 Code of Fed. Regulations Sec. 307.5 at page 396:

> "* * * All coupons bearing date subsequent to a redemption date should be left attached to the securities."

It was our contention in the trial, and still is, that since the bonds were payable to bearer, were issued under the Acts of Congress which authorized Treasury Regulations regarding surrender, redemption and payment, which Treasury Regulations are judicially recognized by our Federal Courts (*U. S. vs. Birdsall*, 233 U. S. 223, and *U. S. vs. Janowitz*, 257 U. S. 42), the decisions of the Federal Court are applicable.

It should be noted that the Trial Court in this action dismissed the case as to the Federal Reserve Bank of Cleveland at the close of plaintiff's case in chief (See Record 285a to 300a).

Defendant First National Bank in Indiana, at the close of plaintiff's case in chief, moved for dismissal of its case (262a), stating the reasons therefor and again, after plaintiff had reopened its case and closed, renewed said motion to dismiss which was refused (300a).

That Federal Law is applicable in this case, we cite the case of *Clearfield Trust Company vs. U. S.*, 318 U. S. 363 (1942). In this case on page 366 the Court, in its opinion, states as follows:

> "We agree with the Circuit Court of Appeals that the rule of Erie R. Co. v. Tompkins, 304 U. S. 64, does not apply to this action. The rights and duties of the United States on Commercial paper which it issues are governed by federal rather than local law.
>
> • • •
>
> The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law, even without the conflict of laws rules of the forum, would subject the rights and duties of the United States to exceptional uncertainty. It would lead to great diversity in results by making identical transactions subject to the vagaries of the law of the several states. The desirability of a uniform rule is plain."

The majority decision of the Third Circuit in this case followed this ruling, clearly indicating the disastrous results if "the several and diverse laws of the states" were to control (see opinion page 498). Further, the Uniform Negotiable Instruments Law falls far short of attaining specific uniformity of result in each instance. The many changes applied by the various states in various instances (Pennsylvania having repealed it entirely) overcome uniformity in any specific instance. So long as there remains state freedom to legislate, the great value of the Negotiable Instruments Law or any other uniform code is the value to general purpose, not to specific instance. Unless and until absolute uniformity of any law such as this is attained, its advocacy in this regard is valuless because one variance in a specific instance nullifies its use.

In further support of our position as herein stated that Federal Law is applicable, we refer to these additional cases:

U. S. vs. Birdsall, 233 U. S. 223.

U. S. vs. Janowitz, 257 U. S. 42.

U. S. vs. Dolphin Deposit Trust Co. et al., 50 F. Supp. 73 Middle District of Pa.

The following is taken from the opinion of this Middle District case, page 75:

> "Because the Federal Government is a party to the contract this is a Federal contract which is necessarily controlled by the Federal law. It is based upon the exercise of the power delegated to Congress to borrow money on the credit of the United States. Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487, does not apply. The borrowing power necessarily includes the power to fix the terms of the Government's obligations. Legal Tender Case, 110 U. S. 421, 48 S. Ct. 122, 28 L. Ed. 204. The Treasury regulations are within the authority given the Secretary of the Treasury by the Congress and have the force of Federal law. United States vs. Bird-

sall, 233 U. S. 223, 34 S. Ct. 512, 58 L. Ed. 930; United States vs. Janowitz, 257 U. S. 42, 42 S. Ct. 40, 66 L. Ed. 120.

"Rules and regulations prescribed by administrative bodies and officers and which are adopted pursuant to authority of an act of Congress, so long as they are reasonably adapted to the enforcement of the act, and are not in conflict with express statutory provisions, have the force and effect of law, Maryland Casualty Co. vs. United States, 251 U. S. 342, at page 349, 40 S. Ct. 155, 64 L. Ed. 297."

We refer to Beutel's Brannan on Negotiable Instruments Law, 7th Edition, page 108, where under the heading "Cases Where Federal Law Applies" is stated:

"There is a well established field outside of the Conformity Act where the Federal Courts have never felt themselves bound to follow State statutes. The Conformity Act itself simply says:

'The laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decisions in trials at common law, in Courts of the United States in cases where they apply.'

In all of those situations where Federal Courts, or for that matter State Courts, deal with paper issued by the federal government or agencies created under Federal constitution and statutes, the cases lie outside the field of the Conformity Act, and the law in such cases flows from the Constitution, the Federal statutes, delegated legislation in the form of departmental rules and orders, and sometimes from decisions of quasi judicial administrative agencies. These taken as a whole may establish a set of rules completely different from those codified in the Negotiable Instruments Law, which has not been adopted by the Congress as a Federal law.

"Where all of the above sources are silent, the Federal Courts have consistently held that although state decisions and interpretations of the Negotiable Instruments Law may be evidence of the general Federal law involved, they are not binding on Federal

Courts and they may decide cases on what they believe to be the rules of justice of the particular facts."

The Conformity Act of Congress here referred to was passed Sept. 24, 1789 and is found in U. S. Statutes at Large, Vol. 1, Page 92. It was re-enacted June 24, 1948 making a change of the words "trial at common law" to "civil actions" and is found as re-enacted in Title 28 U. S. C. A Section 1652. (For copy as amended see Appendix of this Brief.)

We further quote from Beutel's Brannan, the following:

"Thus there is a large and growing field of negotiable instruments wholly outside the Negotiable Instruments Law, and rules of uniformity which it intends to set up. Until Congress adopts the Act, this situation may be expected to continue. The Negotiable Instruments Law is, of course, part of the Code of the District of Columbia (Laws of 1899 U. S. Stat. C. 47) and governs transactions in that area. However, it has not seemed to have been applied to government business originating there and probably was not intended to so apply. Even if the Negotiable Instruments Law or a similar uniform statute were to be adopted for the Federal Government to cover federal business and control interstate commerce and other fields where Federal Law carries procedure, there would still remain the problem of reconciling results with other federal statutes and agency rulings given under proper delegation of authority. These, of course, would tend to perfect uniformity of results with cases dealing only with private commercial paper."

Goodrich on Conflict of Laws, page 44, makes the following statement:

"There remains another phase of this general problem which must not be overlooked. The law of Erie Railroad Company v. Tompkins pertains only to litigation in federal courts by virtue of the diversity of the citizenship of the parties and invoking state created rights.

> Where an action is in the federal court on some other jurisdiction basis, or *involves rights created by federal law, federal facts or policies, the doctrine of Erie vs. Tompkins does not apply.*" (Emphasis ours.)

In the footnotes it states the following: Halmberg v. Ambrecht, 327 U. S. 392, U. S. v. Standard Oil Co. of California, 332 U. S. 301, 1946, 59 Harvard Law Review, 966.

The following is an excerpt taken from this Harvard Law Review, page 970, regarding the Clearfield case:

> "* * * there are particularly strong reasons for applying the federal rule. In its issuance of commercial paper the United States engages in many transactions over a wide area. Under such circumstances a uniform rule, to be applied wherever a case arises, makes for simplicity and certainty. Thus this apparent exception to the Erie vs. Tompkins case does not in fact violate its fundamental tenet—uniformity of decision between state and federal court."

The following is also an excerpt taken from page 975 of this Harvard Law Review regarding the holder of U. S. war bonds:

> "Although the United States in substance is only a stake holder in the controversy its interest in promoting the sale of bonds is advanced by upholding their terms uniformly throughout the country, a result Congress presumably intended."

The authorities all recognize the Federal law in cases where rights, duties or liabilities of the parties are founded in the constitution, treaties or statutes of the United States. The case of U. S. v. Allegheny County, 322 U. S. 174 (1944) states this principle with a long list of authorities. We quote therefrom as follows:

> "Procurement policies so settled under federal authority, may not be defeated or limited by state law. The purpose of the supremacy clause was to avoid the introduction of disparities, confusions, and conflicts which would follow if Government's general authority

were subjected to local contracts. The validity and construction of contracts through which the United States is exercising its constitutional powers, their consequences or rights or obligations of parties, the title or liens which create or permit, all present questions of federal law not controlled by the law of any state. Clearfield Trust Company vs. U. S., 318 U. S. 363; Jackson Company vs. United States, 308 U. S. 343; Carpenter vs. Shaw, 280 U. S. 363; Utah Power and Light Co. vs. United States, 243 U. S. 389; U. S. vs. Ansonia Brass and Copper Co., 218 U. S. 452; D'Oench, Dulme and Co. vs. Federal Deposit Insurance Co., 315 U. S. 447; Dietrick vs. Greaney, 309 U. S. 190; Federal Land Bank vs. Bismark Lumber Co., 314 U. S. 329."

By analogy we add the following authorities:

Huser et al. vs. Woodruff et al., 327 U. S. 726, 732 (1946);

Holmberg et al. vs. Armbrecht, 327 U. S. 392, 395 (1946);

U. S. vs. Standard Oil Co., 332 U. S. 301.

This case of Holmberg *et al.* vs. Armbrecht involved a question of Statute of Limitations. In the opinion by Mr. Justice Frankfurter, page 395, is stated the following:

"We do not have the duty of a federal court, sitting as it were as a court of a state, to approximate as closely as may be to state law, in order to vindicate without discrimination a right derived solely from a state. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. When Congress leaves to the federal courts the formulation of remedial details, it can hardly expect them to break with historic principles in equity the enforcement of federally-created equitable rights."

The case of U. S. vs. Standard Oil Co. *supra*, was an action for an injury to a soldier of the United States Army.

The opinion was delivered by Mr. Justice Rutledge, concurred in by Mr. Justice Frankfurter. After a discussion of both the rule of Erie Railroad Company vs. Tompkins and the Clearfield case, it was held as stated in the syllabus as follows:

> "The decision is not governed by state law where the injury occurred, but by federal law, even though Congress has not acted affirmatively concerning the specific question."

On page 305 the Court states:

> "Although the Clearfield case applied these principles to a situation involving contractual relations of the Government, they are equally applicable in the facts in this case where the relations affected are non-contractual or tortious in character."

Home Owners' Loan Corporation bonds have their origin in the Act of Congress which authorized Treasury Regulations to be made regarding surrender, redemption and payment. The Treasury Regulations authorized payment to be made to a member bank of the Federal Reserve System. Defendant bank was and still is a member bank of Federal Reserve System. Redemption of the bonds in question was made in strict accordance with these Federal Regulations.

IV

Burden of proof was on plaintiff.

Many of the authorities under our previous heading support the statement that plaintiff must carry the burden of proof of a charge of bad faith. What now is the law on this question? We will start with the early case of Murray vs. Lardner, 69 U. S. 110 (1864). This case involved Ambory Railroad Company bonds, payable to bearer, which had been stolen. The Court, on page 121 in this case, states:

> "Suspicion of defect or knowledge of circumstances which would excite such suspicion in the mind of a prudent man, gross negligence on the part of the taker at the time of the transfer will not defeat his title. The result can be produced only by bad faith on his part. *The burden of proof lies on the person who assails the right claimed by the party in possession.*" (Emphasis supplied.)

It is to be here noted that the bonds in this case are not United States Government bonds and yet it was specifically held that the burden of proof was on plaintiff to prove, by competent evidence, bad faith.

The following cases all hold to the same effect on the question of the burden of proof:

Texas vs. White, 74 U. S. 700, 735 (1868). Opinion by Chief Justice Salmon P. Chase;

Presidio Co. vs. Nail-Young Bond and Stock Co., 212 U. S. 58 (1908). The opinion in this case was by Mr. Justice Harlan, citing Murray vs. Lardner and many other authorities;

Marine National Exchange Bank of Milwaukee *et al.* vs. Kalt, Zimmers Manfacturing Co., 293 U. S. 357, 364 (1934). The opinion in this case was by Mr. Justice Cardozo;

Graham vs. White-Phillips Co., Inc., 296 U. S. 27, 32 (1935). The opinion in this case was by Mr. Justice Reynolds.

This last case (Graham vs. White-Phillips) originated in the State of Michigan and was transferred to the Federal Court. The Michigan court rule on burden of proof was in accord with that of the Federal rule. The opinion, page 32, so states that the Michigan rule "accords with what this court said in the Goodman case, 20 Howard 343-365, 366 and 367; Murray vs. Lardner, 2 Wall 110" and other authorities, concluding with the statement, "It accords with 'the view long enforced in England' ".

The Court of Appeals of New York State followed the federal rule in the case of Gruntal *et al.* vs. National Surety Corp., 254 N. Y. 483 (173 N. E. 682, 73 A. L. R. 1337). We here quote at length from this New York State case as follows:

"United States government bonds, payable to bearer, and like bonds of corporations, circulate today as freely as money; title passes by delivery. A broker accepting such securities for disposition on behalf of a customer has little or no means of warning or inquiry such as indorsements or other relationships might suggest. The securities pass from hand to hand by delivery. *He is a mere conduit between the seller and the purchaser, for which he receives a small commission.* The purchaser is not liable for conversion yet the broker, acting without any ground for suspicion, is said to be liable for the full value of the security which he has sold, although he has paid the purchase money over to the seller. The harshness of such a rule has been recognized by the courts in repudiating his liability. *Public policy does not demand the extension* of liability for innocent acts to such a case. In Pratt vs. Higginson, 230 Mass. 256, 257, 119 N. E. 661, 662, 1 A. R. L. 714, the Supreme Judicial Court of Massachusetts said of brokers:

"The question for decision therefore is whether the defendants who received and sold the bonds and accounted for the proceeds to the apparent owner, without notice of any infirmity in the title, or of any circumstances which should have put them upon inquiry, can be held responsible in damages by the true owner for conversion.

'The defendants undoubtedly exercised dominion over the bonds by converting them into money. If the property had consisted of chattels or non-negotiable documents of which certificates of stock are an example, the plaintiff's title would not have been divested by a sale even to a purchaser for value and in good faith. Scollans vs. Rollins, 173 Mass. 275, 278, 53 N. E. 863, 73 Am. St. Rep. 284, and cases there collected. *But to this rule there is a well recognized*

exception where the property consists of negotiable securities.' (Emphasis supplied.)

"The decision of the court is that the brokers were not liable for conversion."

The opinion in this case was written by Crane, J. and concurred in by the following able jurists: Cardozo, C. J., and Pound, Lehman, Kellogg, O'Brien and Hubbs, J. J. This opinion may well be paraphrased to fit the instant case by substituting the word "banker" for "broker".

In connection with the thought of this New York case, we call the Court's attention to the inconsistency of the dissenting opinion of the United States Court of Appeals in the case at bar. In the Court's dissenting opinion at the top of page 505 it treats defendant bank in the transaction of redeeming the bonds as an assignable one and therefore controlled by the "law of the place of assignment". On page 510, however, while admitting defendant "Indiana Bank was not a purchaser", the opinion states it was a "holder" because it was in possession of an instrument payable to bearer. This opinion entirely disregards the fact that defendant bank paid no consideration whatever for these bonds in the transaction. It was a mere conduit to pass them to the Federal Reserve Bank, the proper place for redemption. They were redeemed, the proceeds paid out, and a small charge made for its services. The dissenting opinion fails to adhere to this plain, simple statement of the facts, hence its inconsistency and error. We have here called attention to the foregoing facts in connection with the New York case cited because of its close similarity, by analogy, to the instant case.

The law of Pennsylvania, contrary to the contention of petitioner, appellant, fully supports this position, as is shown by *First National Bank of Blairstown vs. Goldberg et al.*, 340 Pa. 337, wherein the Pennsylvania Supreme

Court sustained a judgment *non obstante veredicto* in favor, *inter alia*, the defendant, a bank which had handled bonds under facts very similar to those in the instant case. While there is certain *dicta* in this case which the trial court and plaintiffs in the instant case, took from context and misapplied, the clear holding of that case, throughout, is in full support of the position of defendant bank here. We quote from the Goldberg case as follows:

> "in the present case, defendants did not part with value for the bonds, but they do not claim any right, title or interest therein as holders; they derived no benefit from the transactions, acting merely as agencies to place the bonds in the hands of brokers for sale and to transmit the proceeds in return. The purpose of the Negotiable Instruments Law is to enhance the marketability of such securities and to allow bankers, brokers and people generally to trade in them with confidence. That object would be defeated if liability were to be imposed upon one who, mistakenly but in good faith, deals with negotiable instruments on the assumption that they belong to the person who employs him to effect their sale through ordinary market channels."

As stated above, though a jury rendered a verdict for plantiff, the lower court entered judgment *n. o. v.* for defendant bank (along with other defendants) and the Supreme Court affirmed. Consistent with the court's opinion and the results as to the defendant Bank, in this Pennsylvania Case, the affirmance of a judgment *non obstante veredicto* placed the burden of proof of the case on the plaintiff.

The foregoing decisions all follow the Federal and State law and are applicable to bearer United States Government bonds.

As we have previously stated, the Uniform Negotiable Instrument laws adopted by the different states will not

establish uniformity in a particular instance of fact due to the variations, amendments and changes made to it by the different states. As an example of these variations and changes, we refer to the laws of the State of Illinois which have twelve amendments to the Uniform Negotiable Instrument Law (see Smith-Hurd Ill. Annot. Statutes Vol. 98, Sections 25, 26, 29, 60, 69, 77, 81, 86, 88, 91, 141 and 207.) New York State law has many changes and variations. The Commonwealth of Pennsylvania has recently repealed it entirely by the enactment of the Uniform Commercial Code (1953 April 6, P. L. 3, Sections 10-103) (12 A. Purdon's Pennsylvania Statutes Sections 10-103). Further references to changes, amendments and variations from the Negotiable Instruments Law of other states need not here be referred to to show lack of uniformity.

But even more important, Section 59 the Uniform Negotiable Instruments Law does not purport to cover the circumstances of the case at hand. The sections of that law which plaintiffs would have apply pertain to the parties in the position of purchasers as such, and not "conduits" or "transfer agents" as the defendant bank here is.

V

The Trial Court erred in admitting in evidence Exhibits 7, 8, 9 and 10 on the assumption that knowledge of their contents would be proven to have reached defendant bank, and when not so proven, to have stricken them from the record.

The majority opinion of the United States Court of Appeals found it unnecessary to discuss specifically these exhibits. However, since the dissenting opinion refers to them (514), we here call attention to what we regard as

error by the Trial Judge in admitting them as evidence and permitting them to be read to the jury.

These exhibits are referred to in our "Statement of Case" pages 5, 6, which refers to the pages in the record where they were read to the jury. That they were offered in evidence in an undertaking to charge knowledge of their contents to defendant bank appears from the statement of counsel when offering Exhibit 7, as follows:

> "It is also offered as one of a series of documents intended to show the wide notice given to the loss of these bonds. And for that purpose, it is offered against all the defendants." (93a, 94a).

When objections were interposed in connection with the offer of Exhibit 9, the following occurred (106a):

> "The Court: It is admitted under the Business Records Rule. The question of what it says and so forth is for the jury. There may be matters of hearsay and all that sort of thing.
>
> As I understand, you are still offering on the question of notice.
>
> Mr. Kirkpatrick: We are still offering on the question of notice and we take it it is our duty to offer the notice in the form it was actually given."

The Court again, in discussing the admissibility of Exhibit 9 (107a) states:

> "The Court: *It is admissible for any purpose.* The mere fact that it has something of that kind in it, it is still admissible." (Emphasis supplied.)

It is difficult to see how these exhibits are business records between plaintiff and defendant bank when they never had any business dealings whatever with each other. This Exhibit 9 was read before the jury (251a) under objections overruled in behalf of defendant bank (108a, 109a). We stressed and emphasized our objections to this exhibit and the others, as will appear by reference to the record pages 125a to 127a inclusive. Following a discussion from page

128a to 133a counsel for defendant bank moved to strike the Exhibit 9 and previous exhibits from the record. On page 134a the Court finally made the following statement:

> "Now, the question is, it isn't necessarily conclusive on your man, your bank, as to whether they got it or whether they didn't. But notices went out through banking channels. *If he wants to bring that home to you, that is up to him.*" (Emphasis supplied.)

Here we submit it is clear they were read on the assumption that their contents would later be brought home to defendant bank. The record can be searched from cover to cover and neither the contents of Exhibit 7, 8, and 9 nor that of Exhibit 10 were ever brought home to defendant bank as the Court indicated would have to be done. Throughout in the trial in the offer of these exhibits we submit there was the assumption that their contents, by proper evidence, would be brought to the knowledge of defendant bank, and when not done they should have been stricken from the record.

Plaintiff made a strenuous effort to prove that the contents of these exhibits reached defendant bank by calling Mr. Halford, of the Federal Bureau of Investigation (188a *et seq.*), which entirely failed. Even the dissenting opinion concedes it was not shown that the contents of these exhibits ever reached defendant bank, which appears from the following statement (514, 515):

> "It is not claimed that any of these reached the Indiana Bank so as to charge it with the knowledge which these notices contain."

It is difficult, however, to understand how a "hue and cry" explanation made by this dissenting opinion would justify their admission when the "hue and cry" was made in California in 1944 and the transaction in this case occurred in Pennsylvania in 1948. (Knowledge of a director or depositor of defendant bank is not chargeable to the bank.

U. S. National Bank vs. Evans, 296 Pa. 541, 547, American National Bank vs. Miller, 229 U. S. 517 and 7 A M. Jur. Par. 284 under heading "Banks").

We further submit any statement which may be found by the Trial Judge regarding these exhibits and their effect could not possibly overcome their prejudicial results before the jury. The following cases support our position that these exhibits were inadmissible:

Graham vs. White-Phillips Co., 296 U. S. 27 (1935);

Merchant's National Bank vs. Detroit Trust Co., 258 Mich. 526, 242 N. W. 739 (1932);

Kentucky Rock Asphalt Co. vs. Mazza's Administrator, 264, Ky. 158; 94 S. W. (2d) 316 (1936);

State Bank of Benkelman vs. Iowa-Des Moines National Bank & Trust Co., 223 Iowa 596, 273 N. W. 160 (1937).

These cases all follow a well established rule that even though one may have received actual notice, if by forgetfulness or negligence he does not have it in mind when the bonds were received, he is still regarded as acting in good faith. Graham vs. White-Phillips Co., 296 U. S. 27 (1935) is probably the leading case on this question. In that case, eight negotiable bonds were stolen from the plaintiff on August 30, 1930, and were purchased by the defendant in the ordinary course of its brokerage business on September 22, 1930. The plaintiff had caused notice to be sent to the defendant and other dealers just three days after the theft occurred. Yet, although *less than three weeks* had elapsed between receipt of the notice and the purchase of the bonds by defendant, the Court held that defendant had none the less acquired title to the bonds as a holder in due course, and was not liable; yet in the case at bar, by the element of time alone more than four and one-half years had elapsed since the so-called notices (with no proof of delivery).

When the rule as herein stated was applied to a holder of securities in due course, it should all the more apply to a mere agent for collection or redemption.

We might further discuss the error in admitting in evidence these exhibits, but this Court may find it unnecessary to do more than conclude as did the majority decision of the Third Circuit, that the evidence does not "show any bad faith on the part of the Indiana bank". There is no evidence in the case by which to charge defendant bank with any notice of any kind whatever.

Reply to certain matters contained in Brief of Plaintiff, Bank of America National Trust and Savings Association.

One of the errors of plaintiff in this case is the assumption that defendant bank's defense was made on the basis that it was or became a "holder in due course" of the bonds in question. In its Summary of Argument, page 10, is made the following statement: "The defendants had the burden of proving their asserted defense of being holders in due course." A heading in plaintiff's Brief of Argument, page 36, is as follows: "The defendant-respondents had the burden of proving their asserted defense of being holders in due course". Defendant bank never did assert, nor did it ever attempt to defend this case as a "holder in due course". This statement is verified by reference to defendant bank's Answer, beginning at page 15a of the record. It will be noted that Paragraph 7, sub-paragraphs (b) and (c) in the Answer, page 16a, expressly alleged the bonds were received by defendant bank "*for redemption*". This same statement is made with reference to the second lot of bonds, which appears in sub-paragraphs (g) and (h), page 17a of defendant bank's Answer. To the effect that defendant bank did

not defend as a holder in due course is further substantiated by reference to certain excerpts from a colloquy on defendant bank's Argument on its Motion for Dismissal of this case before the Trial Judge. On page 228a and 229a of the record appears the following:

> "The Court: * * * In other words, you didn't buy those bonds for investment."
>
> Mr. Miller, Jr.: Oh, no. We were—undoubtedly it (209) was a situation of conduit, as described—"

On page 232a of the record appears the following:

> "The Court: Well, according to that, you are in a different position than Mr.—we will say Mr. Parnell is? (212) Is there a distinction in your two positions?
>
> Mr. Miller, Jr.: There might be some distinction, yes, your Honor, because it is a customary practice of banks to take these bonds in, particularly national banks I think would be subject to criticism if they *refused their customers receiving Government securities for clearance.*" (Emphasis supplied)

Further, on said Motion, page 264a, appears the following:

> "The Court: The difference in your position and the position of the banks in the cases you cite is that those banks purchased the securities and you didn't, in this case.
>
> Mr. Miller: *In one of those cases, I believe it was a situation of a conduit.* But I think a purchaser of a security is even in a more tenuous position as far as the burden of proof than a *mere conduit banking institution for banking purposes.*" (Emphasis supplied)

We are at a complete loss to understand upon what possible state of facts in this case plaintiff-petitioner contends and argues "the defendants had the burden of proving their asserted defense of being holders in due course." Even the trial judge in his opinion (446a) makes this statement:

> "The bonds were handed to the Bank in Indiana by Parnell and were, by the Bank in Indiana, forwarded to the Federal Reserve Bank by letter for collection. Neither Parnell nor the Bank in Indiana claimed to be a holder in due course within the definition of that term in the Negotiable Instruments Act, 56 P. S. 132."

Defendant bank never asserted otherwise than that it was a mere "conduit" or agent for the redemption or collection of these bonds and never claimed to have any title or right as a "holder in due course" or otherwise than as a mere collecting agent or representative. Based on the foregoing erroneous assumption, plaintiff then proceeds with a lengthy Negotiable Instruments argument which is entirely aside from any issue or question involved in this case.

Again plaintiff's Brief states (page 32):

> "Thus, the old rule exemplified by Murray v. Lardner, 2 Wall. 110, if correctly interpreted by the court below, is now completely outdated and should no longer be regarded as stating the rule applicable in the federal courts."

This statement is clearly answered by the United States Court of Appeals in its opinion, page 499, as follows:

> "Murray v. Lardner has never been overruled and has been referred to by the Supreme Court as late as 1935. See Graham v. White-Phillips Co., 296 U. S. 27, 32 (1935); Marine Bank v. Kalt-Zimmers Co., 293 U. S. 357, 364 (1934). See also 11 C. J. S. Bonds 654g, wherein it is pointed out that the federal law (and the common law) and the law under the Negotiable Instruments Act in many states are not in accord."

In fact, the decision of Murray v. Lardner is as important in establishing the credit of United States securities and their freedom in circulation as were the early decisions of Chief Justice John Marshall on constitutional questions. It is appropriate here to state that the section of the Negotiable Instruments Law, which plaintiffs advocate, is

almost entirely a codification of the law merchant far more ancient in origin than the doctrines of this Honorable Court which are here criticized.

Plaintiff's Argument, page 38, following a quotation from "Britton on Bills and Notes" refers to the cases of Keane v. National City Bank, 294 Fed. 214 (1928) and to Queenan v. Mays, 90 Fed. 2nd 525 (1932). This Keane case is one in which a new trial was ordered after judgment for defendant. It involved not the clearance of bonds, but the cashing of drafts by a bank for a person of known ill-repute and where the bank was fully informed of adverse facts. The Queenan case was tried on an agreed statement of facts which admitted the bank never gave value for the bonds in question at any time and was therefore unjustly enriched as a result of its *wrongful hypothecation* for its own use. Neither the quotation from Britton on Bills and Notes nor the facts in the cases cited in connection therewith can have any possible application to the facts in the instant case.

The Circuit Court of Appeals by its decision found it unnecessary to consider several questions which were raised by defendant bank on error from the Court below. (Opinion of the Court, Record p. 504 (fol. 66). We take it that these questions are not therefore here raised on this appeal.

Conclusion

If Federal law and the law of Pennsylvania were in conflict as they applied to the facts of this case, strong argument can be made to support the conclusion that Federal law, in the case of United States Government Securities, controls. Such issue of conflicts of laws is not here presented. For the law of Pennsylvania is in accord with the Federal law as it affects the issues of the case. The burden of proof of this case, as it stands on the evidence given at trial, is on the plaintiff. There is no evidence upon which a verdict and judgment for plaintiff can be sustained. The decision of the United States Court of Appeals for the Third Circuit, reversing the United States District Court for the Western of Pennsylvania and entering judgment for the First National Bank in Indiana, of Indiana, Pennsylvania, should be affirmed.

Respectfully submitted,

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Appendix

I.

Conformity Act, Title 28 U.S.C.A. Section 1652.

The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply. June 25, 1948, c. 656, 62 Stat. 944.

II.

Statutory Provisions known as the "Home Owners Loan Act of 1933", Title 12 U.S.C.A. Section 1461 *et seq.*, as amended and approved by the Act of April 27, 1934, and Treasury Regulations issued thereunder.

III.

Certain pertinent excerpts from Treasury Regulations.

U. S. Treasury Department Regulations Circular No. 666 Para. 307.5: 6 Fed. Register 3726, 31 Code of Fed. Regulations Section 307.5 @ p. 396

> "307.5 * * * Such securities should be presented and surrendered * * * to any Federal Reserve Bank or Branch thereof, * * *. A Federal Reserve Bank, upon appropriate request, may make payment to a member bank from which bearer securities are received by crediting the amount in the member bank's account."

U. S. Treasury Department Regulations Circular 300, Para. 79: Title 31 Code of Fed. Reg. chapt. II, Section 306.79 @ p. 389

> "79. Coupon bonds or notes lost or stolen—The Treasury Department can grant no relief on account

of lost or stolen coupon bonds or notes. United States bonds and notes in coupon form are payable to bearer, and title thereto passes by delivery, without indorsement, and without notice to the Treasury Department. Under generally recognized principles of law an innocent purchaser for value without notice before maturity acquires good title to coupon bonds or notes even though reported lost or stolen, and no proof of ownership is required when coupon bonds or notes are presented in regular course to the Treasury Department, or its designated agencies, for payment, exchange or conversion. The Treasury Department assumes no responsibility whatever with respect to coupon bonds or notes reported lost or stolen and enters no stoppages or caveats against their payment, exchange, or conversion. This is the long-established policy of the Treasury, and is in accordance with the following public announcement made by the Secretary of the Treasury on April 27, 1867, and reaffirmed and republished from time to time as to United States bonds and notes in coupon form reported lost or stolen:

'In consequence of the increasing trouble, wholly without practical benefit, arising from notices which are constantly received at the Department respecting the loss of coupon bonds, which are payable to bearer, and of Treasury notes issued and remaining in blank at the time of loss, it becomes necessary to give this public notice, that the Government cannot protect, and will not undertake to protect, the owners of such bonds and notes against the consequences of their own fault or misfortune.

'Hereafter all bonds, notes, and coupons, payable to bearer, and Treasury notes issued and remaining in blank, will be paid to the party presenting them in pursuance of the regulations of the Department, in the course of regular business; and no attention will be paid to caveats which may be filed for the purpose of preventing such payment.

'The Treasury Department does not undertake to furnish any information with respect to the presentation of coupon bonds or notes reported lost or stolen,

but it will, wherever possible, in order to assist in tracing lost or stolen securities, furnish, upon appropriate written inquiry, such information as may be available in the Department as to whether or not bonds or notes reported lost or stolen have already been presented, and, if already presented, as to the source from which they were received. United States coupons bonds and notes are customarily handled in the regular course of business without reference to serial number, and in most cases, therefore, it is improbable that any information will be available as to the source from which received.' "